U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUL 21 2009

SRC 07 800 22949

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time she filed the petition, the petitioner was studying for a Ph.D. in biochemistry and molecular biology at Johns Hopkins University (JHU), Baltimore, Maryland. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on July 26, 2007. In letters accompanying the initial filing, several witnesses described the petitioner's work. [redacted] stated:

> Up to 50% of adult American males over the age of 50 suffer from lower urinary tract symptoms due to benign prostatic hyperplasia (BPH). . . .
>
> [The petitioner] is currently focusing on the mechanistic research of prostatic hyperplasia, in the laboratory of [redacted], a world leader in the research

> field of prostatic disease. I am [the petitioner's] co-mentor. [The petitioner's] work . . . has enhanced our understanding of the molecular events underlying the etiology of prostatic hyperplasia and will help us to rationally design . . . new prevention and anti-BPH strategies. . . .
>
> [The petitioner] has made central contributions to the success of the extremely important projects. She provided the first molecular biology evidence that the development of prostatic hyperplasia is the result of accumulated effects of altered hormonal sensitivity during aging, linked to cell cycle regulators. . . .
>
> In . . . another project, she discovered that progenitor cells in the basal epithelia express p63, and are capable of self-renewal and progression to trans-amplifying intermediate cells. She found that trans-amplifying cells are also capable of limited proliferation, but are ultimately destined for terminal differentiation. She proposed a progenitor cell model of prostatic epithelial cell compartmentalization. . . . With these approaches, she is answering the question that has been left unsolved for several decades: Does prostatic hyperplasia result from changed numbers of progenitor cells or altered function/activity of progenitor cells?
>
> . . . [The petitioner] is the only member of laboratory who has the expertise and experience to perform the scientifically and technically very demanding research in which the laboratory is engaged. If [redacted] lost [the petitioner], it would have a major negative impact on current prostate research at Johns Hopkins University and in the United States. It would be extremely difficult to find another person with [the petitioner's] expertise and abilities.

With regard to the last paragraph above, the petitioner entered [redacted] laboratory as a new Ph.D. student; it is not clear how much of her current "expertise and abilities" she brought with her upon arrival, as opposed to how much she learned from [redacted]. Also, the petitioner's F-1 student visa is sufficient to keep the petitioner at JHU until she finishes her doctorate; denial of the waiver would not force her immediate expulsion from the program. By nature, doctoral studies are inherently temporary; her work in [redacted] laboratory is not open-ended, but rather directed at completing specific doctoral projects. [redacted] opined that the petitioner should remain in [redacted] laboratory, but he did not specify in what capacity. Surely she cannot and will not remain a doctoral student indefinitely, but the record contains nothing to show that JHU intends to employ the petitioner permanently. Postdoctoral positions, typically the next step after completion of a doctorate, are also temporary, short-term training appointments. The assertion that a given laboratory cannot afford to lose a particular alien carries very little weight without significant assurance that the laboratory intends to employ the alien long-term (and that the alien intends to continue working there rather than seek other employment).

[redacted] stated:

> [The petitioner] has identified the higher proliferation potential of the old dorsal and lateral lobes of Brown-Norway rat prostate, than the normal control ventral prostate. . . . [The petitioner's] research provided a breakthrough explanation to the pathogenesis of prostatic hyperplasia, with the primary contributing factors of increasing age and changing hormonal milieu. . . .
>
> [The petitioner] stands at the top of her research field. She is a well-known leading young scientist in China. . . .
>
> [The petitioner] is critically important to the success of our research projects. It is quite rare to find an individual with the same capacities. . . .
>
> [The petitioner] is virtually indispensable to the success of our research projects. We would lose a promising young scientist in the field and our research project would be adversely affected if [the petitioner] were unable to continue to participate in our research program.

[redacted] did not specify the capacity in which he intended the petitioner to continue working in his laboratory after she completes her Ph.D. studies.

also stated that the petitioner's "research findings have been submitted to *Molecular Endocrinology*, the leading journal in the field of endocrinology." The article submitted to *Molecular Endocrinology* bears the title "Prostatic epithelial cell hyperplasia in the aging Brown Norway rat is marked by age-dependent and lobe-specific increases in cell proliferation." The record is devoid of evidence to show that *Molecular Endocrinology* actually accepted and published the petitioner's work.

[redacted]y stated:

> Using a variety of sophisticated molecular and cell biology techniques, [the petitioner] made important discoveries about the does-dependent effects of testosterone administration on cell proliferation in the lateral, dorsal and ventral lobes of prostate in young and aged Brown Norway rats following tissue regression due to androgen withdrawal by castration. . . . [The petitioner] is the first scientist to demonstrate that age-dependent changes in the sensitivity of prostate lobes to androgens . . . might promote the abnormal cell proliferation that leads to prostatic hyperplasia.
>
> [The petitioner] is a highly gifted physician scientist with unique experimental skills and extraordinary research abilities. Her accomplishments are truly outstanding and have earned her an international reputation for excellence in the field of biomedical research.

[redacted] of Georgetown University Medical Center, who has collaborated with the petitioner, professed to be "confident that the technologies [the petitioner] has implemented will shed light on new treatments for prostatic hyperplasia."

[redacted] of the University of Illinois at Chicago stated:

> As [the petitioner's] research has had a great impact on understanding the mechanisms underlying this widespread and costly disease, I truly believe that [the petitioner's] research and expertise will bring new insights to the prevention and treatment of prostatic hyperplasia.
>
> . . . I have not worked with [the petitioner] personally but . . . I have had several professional interactions with her including discussions of her research and analysis of her data. . . .
>
> [The petitioner's] findings are very important to the development of new therapies, because they reveal the molecular mechanisms that underlie the etiology of prostatic hyperplasia.

Medical Team Leader at the U.S. Food and Drug Administration, stated:

> I have never met [the petitioner] personally and my recommendation is based solely on my evaluation of her academic and research record.
>
> In reading her papers, especially the one under review by the prestigious journal *Molecular Endocrinology*, I am struck by the depth of knowledge and wide range of expertise of this young biomedical scientist. Her discovery that specific prostate lobes respond[] paradoxically to decreased testosterone levels is of great importance because it, for the first time, offers an explanation for the increase in prostate size despite decreased levels of testosterone in aged males. . . .
>
> [The petitioner's] groundbreaking findings are delineating all the mechanisms and molecular factors that regulate the hormonal control of abnormal cell proliferation and prostatic hyperplasia.

[redacted], Associate Professor at Thomas Jefferson University, stated that the petitioner's "discoveries . . . will also have a profound influence on industry. Her findings provide new prospects for disease therapy."

[redacted] Director of Research at the Institut Curie at the Centre National de la Recherche Scientifique, Paris, France, did not focus on the petitioner's work with BPH. Instead, [redacted] stated:

> There are prevalent health and developmental problems and overall disability among children who have had meningitis in infancy. *Escherichia coli* K1 is the most common

> Gram-negative organism causing neonatal meningitis. . . . [The petitioner's] research has had a great impact on the fight against neonatal meningitis.
>
> [The petitioner] has made significant contributions to the research on signal transduction by Src family protein tyrosine kinases in the pathogenesis of neonatal meningitis and its application in detecting, preventing and controlling this infectious disease caused by pathogenic bacteria. This is a very important progress and set her on the top as a physician scientist in the biomedical field. . . . [The petitioner] used an in vitro model of blood brain barrier, which is composed of human brain microvascular endothelial cells (HBMEC) alone. This model is currently used by many laboratories around the world to study the pathogenesis of meningitis caused by various microbes.

did not specify whether the petitioner created this *in vitro* model, or simply selected the best existing model for her purposes. also stated that the petitioner has done other work with *E. coli* genes. [redacted] did not specify how the petitioner's earlier work with *E. coli* at China Medical University relates closely to her later work at JHU with the prostate glands of Norway rats.

An exhibit list in the record includes the petitioner's "International Peer-Reviewed Journal Publications." All of the petitioner's published articles appeared in 2002 or earlier, based on her work in China. The list names four more recent articles, but all of them are described as "in preparation" or "under review." The record, therefore, shows that, at the time of filing, the petitioner had not yet published any findings relating to her recent work relating to BPH. To describe unpublished manuscripts as "international peer-reviewed journal publications" is, to say the least, inaccurate. Subsequent submissions confirm the publication of only one of these four articles. We must balance witnesses' claims about the importance or significance of the petitioner's work against the lack of evidence that the petitioner's manuscripts survived peer review.

On January 15, 2008, the director issued a request for evidence, instructing the petitioner to submit evidence (including independent citations) of the petitioner's influence on her field. The director also requested copies of the petitioner's published work. The petitioner submitted copies of unpublished manuscripts (which, by definition, are not published work), and a copy of one published article that appeared in *Endocrinology* in 2008. The article, "Cell Proliferation and Expression of Cell Cycle Regulatory Proteins that Control the G1/S Transition Are Age Dependent and Lobe Specific in the Brown Norway Rat Model of Prostatic Hyperplasia," appears to be a revised version of the article previously submitted to *Molecular Endocrinology* under a different title. The petitioner did not address the change of journals, despite having previously placed considerable emphasis on the prestige of *Molecular Endocrinology*. The petitioner submitted no evidence that other researchers have cited the petitioner's work in their own writings.

The petitioner also submitted four additional witness letters. [redacted], in his second letter, observed that the petitioner's "first paper from my lab was published in *Endocrinology* . . . which ranks #1 among the highly respected journals in the field of endocrinology." Earlier, when the petitioner intended to publish the article in *Molecular Endocrinology*, [redacted] claimed that "*Molecular Endocrinology*

[is] the leading journal in the field of endocrinology." [redacted] did not explain how one journal can be "the leading journal" while a different journal "ranks #1" in the same specialty. He also did not explain the circumstances by which a paper submitted for publication in one journal came to be published in a different journal. [redacted] offered no information about the fate of the petitioner's other three articles, which six months earlier had already been sufficiently complete for the petitioner to submit in manuscript form. The available evidence does not readily indicate that publishers in the petitioner's field share the witnesses' opinions regarding the importance of the petitioner's work.

A letter signed by JHU [redacted] indicated that the petitioner's "important findings on progenitor cell niches of prostate have had a great impact on understanding the complex, interactive structures that integrate local and systemic signals for the positive and negative regulation of the progenitor cell activities in a spatially and temporally defined manner." The letter referred to [redacted] as "the chairperson of the National Academy of Science [*sic*] and a Noble [*sic*] prize winning scientist." The misspelling of "Nobel" is of concern, as is the letter's repeated misidentification of the National Academy of Sciences (NAS) as the "National Academy of Science." Also, the NAS is led by a president, not a "chairperson," and [redacted] has never held the NAS presidency. Elsewhere, the letter correctly referred to [redacted] as chair of the NAS Committee on Human Rights, which is considerably different than "the chairperson of the National Academy of Science." It appears, from these errors, that the letter was written for [redacted] rather than by him, and that [redacted] missed the errors when he signed the letter. While the AAO does not dispute the authenticity of [redacted] signature, the errors necessarily diminish the credibility and weight of the letter.

[redacted] of the University of Münster, Germany, stated that the petitioner's article in *Endocrinology* "explains the paradox which has been left unsolved and challenged the scientific and medical community for many years." The record contains no objective evidence that the scientific community considered the subject of the petitioner's work to be a major unsolved paradox before the petitioner began requesting witness letters.

Professor at the University of Massachusetts and Editor-in-Chief of *Endocrinology*, asserted that two more articles by the petitioner "are under review by *Endocrinology*." [redacted] asserted that the petitioner's "scientific achievements have . . . significantly influenced my own research." The record does not show that [redacted] has cited any of the petitioner's articles in his own work, nor did [redacted] state any intention of doing so. [redacted] stated that the petitioner's findings "are not only extraordinary scientific achievements, they will also provide pharmacologists, endocrinologists, and urologists with the molecular targets for the design of effective medicines to control this disease." This last statement is fairly typical of a pattern in the record, in which witnesses assert that the petitioner's work has the potential to influence the future work of other researchers. The record does not show the extent, if any, to which this hypothetical potential has been realized. Witnesses assert that researchers and drug developers might use the petitioner's work; but the record fails to show that researchers and drug developers actually have used it to any significant extent. We will not approve the petition based entirely or largely on unrealized future potential, on the chance that the petitioner's work may eventually prove to be more influential than it has been to date.

The director denied the petition on November 15, 2008, stating that the available materials "suggest that the petitioner's work has gone largely unnoticed by the greater field and hasn't demonstrated a nationally significant impact." On appeal, counsel states that the petitioner "has a record of prior achievement that significantly serves the national interest in public health and advanced medical research, as is evident from the following recitation of facts." The first "fact" is the conclusory and subjective assertion that the petitioner "is an outstanding scientist with an unsurpassed record of training, experience, scholarship and research in the fields of molecular cell biology, aging, endocrinology and urology." It is not readily clear how the petitioner's still-unfinished education is "unsurpassed" in the field.

Counsel stated:

> [W]hen she filed her Petition, Appellant was already the first author of multiple international publications about the disease prostate hyperplasia that had already been published or were soon to be published in the highly-rated journals *Endocrinology*, *Molecular Endocrinology*, *The Prostate*, and the European-based *FEBS [Federation of European Biochemical Scientists] Letters*.

The record does not identify any prostate-related article by the petitioner "that had already been published" as of the filing date. The list of articles submitted with the initial submission did not mention anything submitted to *The Prostate*, published or unpublished. The article submitted to *FEBS Letters* was not "about the disease prostate hyperplasia," and the record does not show that this article was ever published, or even accepted for publication. Therefore, the claim that this article is "soon to be published" is entirely without support. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Add to this that many of counsel's claims are factually suspect or outright incorrect, and it is clear that we can give little credence to counsel's "recitation of facts."

Counsel is correct that the record contains a number of letters attributed to independent witnesses, but neither USCIS in general nor the AAO specifically has ever stated that independent witness letters guarantee the approval of a waiver petition. We must consider all the factors, including the sources and content of the letters as well as how well the rest of the record corroborates the assertions in the letters. We acknowledge counsel's observation that the record contains a letter from a Nobel laureate, but we cannot ignore that this letter misspelled "Nobel" and falsely identified its attributed author as "the chairperson of the National Academy of Science." We cannot conclude that [redacted] carefully reviewed the letter for accuracy prior to signing it, because these errors would not have escaped his focused attention.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

While the petitioner has submitted independent witness letters that praise the petitioner's work as innovative and important, and we do not question the sincerity of the witnesses, the objective evidence of record simply does not support the witnesses' claims or show that the opinions of those witnesses represent any sort of consensus in the petitioner's specialty.

The record shows that, when she filed the petition, the petitioner was a Ph.D. student whose doctoral work had not yet yielded any published work. Assertions that four articles were shortly forthcoming have borne minimal fruit. The available evidence suggests that, at the time of filing, the petitioner had had only limited opportunities to influence her field at all. Materials submitted since that time have not included any objective documentation to show that the petitioner's work has had any more influence or impact than that of countless others in the same specialty. Our most generous assessment of the situation would be that the petition was filed prematurely.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.